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# PROPERTY'S MEMORIES

Eduardo M. Peñalver\*

## INTRODUCTION

My grandmother spent the last forty years of her life longing for the modest, middle class home on Calle Concordia in central Havana that she had not seen in decades. Dementia at last robbed her of the power even to recall what she had lost. But in her senility, she still showed the scars of revolution. Until her death in 2003, she quietly hoarded any household items she could manage to squirrel away. Tubes of toothpaste, disposable razors, and pouches of artificial sweetener disappeared by the dozens into the drawers and cupboards of her bedroom. The story of my grandmother's loss and longing could be told thousands of times over by other Cubans of her generation who left behind their homes and possessions to come to the United States, as the Cuban-American saying goes, with nothing but "*una mano adelante y otra atraz*."<sup>1</sup>

No one does nostalgia like Cuban-Americans. The Cubans who left the island in the years after Castro's rise to power have made it their own special emotion, what Ricardo Ortiz has called their "most profound psychic addiction."<sup>2</sup> Latinos from other countries will often tell you, at least when Cubans are not around, that Cubans are the "Jews of the Caribbean." And so it is perhaps no accident that Cuban-Americans ring in the New Year with a very Jewish toast: "Next year in Havana."

Although the phenomenon is obviously complex, a significant dimension of Cuban-American nostalgia is connected with property. Most obviously, their nostalgia feeds on the homes and landed estates many Cubans left behind with every intention of returning when Castro's government fell, as they thought it surely must within a year or two. For many, the passage of fifty years has dampened neither the certainty of, nor the fervent hope for, the regime's imminent departure. But Cuban-American nostalgia also derives its power, almost as painfully, from boxes of family photos, childhood toys, and keepsakes that remained behind because, as every

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\* Professor of Law, Cornell Law School. Special thanks to Nomi Stolzenberg, Ravit Reichman and participants in the Conference on Law and Memory at USC for inspiring and motivating me to develop thoughts that had been kicking around in my head for some time. Thanks also to Greg Alexander and participants in Fordham Law School's conference on the social function of property for many helpful comments and suggestions.

1. Literally: "One hand in front and the other behind" (to hide one's nakedness).

2. Ricardo L. Ortiz, *Café, Culpa and Capital: Nostalgic Addictions of Cuban Exile*, 10 YALE J. CRITICISM 63, 73 (1997).

Cuban-American child has been told hundreds of times since, departing exiles were only allowed to carry with them a single suitcase of belongings.

The property Cubans unwillingly left behind is just part the story. The flip side is the important role that property, or, more accurately, property distribution, played in sparking the revolution that drove them away. Again, while obviously more complex than any one causal explanation can capture, the upheaval that has ultimately resulted in fifty years of Castroism was due as much to the perceived injustice of unevenly distributed property—especially (but not exclusively) land—as to any other single factor.<sup>3</sup> The progressive 1940 Cuban Constitution, which formed one of the inspirations of the anti-Batista movement, called for the breakup of land oligopoly and the redistribution of agricultural lands.<sup>4</sup> While the 1940 Constitution's social democratic vision was subsequently abandoned by the Castro government in favor of a more radical, Stalinist model, it is no coincidence that one of the first acts of the Castro regime upon taking power was the enactment of agrarian land reform.<sup>5</sup>

Despite my focus on the topic in this introduction, this is not a paper about the Cuban Revolution, or even about the penchant of Cuban exiles to engage in the most extravagant public displays of nostalgia. Nevertheless, the various facets of the Cuban experience shed light on the complex structure of property's memory, or, more accurately, property's memories.

At the most basic level, the Cuban experience helps to reveal a distinction between two fundamentally different orientations within the relationship between property and memory. The nostalgia of exiles for property long since lost exemplifies the continuing power of our memories of property. As I argue in Part I, memory of property can itself be broken down into various kinds, depending on the nature of the subject and object of the memory. And, where memory of property diverges from formal title or possession, the law must somehow mediate between the conflicting claims or even conflicting memories. In Part II, I explore the notion of memory *in* property. Like memory of property, memory "stored" in property can be individual or plural, both in its subject and in its object. The ossification of property maldistribution that helped to feed the Castro revolution exemplifies communal memory embedded *within* a system of property. As with memories of property, memory embedded in property is a normatively ambiguous phenomenon. It serves important social functions, but at a cost. And the law treats memory embedded in property with a distinct ambivalence. Finally, in Part III, I briefly discuss three areas

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3. See generally LOUIS A. PÉREZ, JR., *CUBA: BETWEEN REFORM AND REVOLUTION* (3d ed. 1988); RAMON EDUARDO RUIZ, *CUBA: THE MAKING OF A REVOLUTION* (1968).

4. CONSTITUCIÓN DE LA REPUBLICA DE CUBA (1940) art. 90, *translated in* AMOS J. PEASLEE, 1 *CONSTITUTIONS OF NATIONS* 526, 541 (1st ed. 1950) ("Large landholdings [*latifundia*] are proscribed, and to do away with them the maximum amount of land that each person or entity can have, for each kind of exploitation to which land is devoted, and bearing in mind the respective peculiarities, shall be specified by law.").

5. See Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms and the Property Reforms of the Cuban Revolution*, 52 *FLA. L. REV.* 107, 122–26 (2000).

where contemporary lawmakers are attempting to privilege past memory in ways that depart from the common law's more balanced approach.

### I. MEMORIES OF PROPERTY

Memory of property is probably what first springs to mind when the two constituent concepts are juxtaposed. It was the memory of specific items of physical property that most powerfully characterized my grandmother's life after the Cuban Revolution and that continues to fuel the powerful nostalgia of Cuban exile culture. But there is another, less individualized dimension of memory of property: the memory of past distributions of property. In this part, I will discuss both of these in turn, spending a little more time on the memory of property distributions, which has received less attention than the connection between individual people and specific things.

The importance of individual memory of individual items of property is both obvious and much discussed in academic property circles. To use Holmes's evocative image, individual items of property take root in human beings over time.<sup>6</sup> This tendency generates what Joseph Singer has called a powerful "reliance interest" that gradually builds up in long-standing property relationships.<sup>7</sup> This temporal reliance interest can be formed by owners and non-owners alike, and both will often seek to preserve the status quo on which they have come to depend. In recognition of this phenomenon, when other factors are in equipoise, property law reflexively favors those who are first in time, perhaps with the idea that the person with the longer standing connection to the property has formed the more powerful memories.<sup>8</sup>

But property supplements these first-in-time rules with mechanisms for divesting original owners of their property when confronted with claims by those whose memories of the property are more immediate. Doctrines as diverse as rent control, adverse possession, and prescription provide legal protection to long-established land uses of individual items of property, even those that were initially illegal.<sup>9</sup>

In addition to the sorts of individual memories of property that I have been discussing, the memory of property has a powerful social dimension. When entire communities remember property they have lost, the memories reinforce one another, allowing them to persist over multiple generations. Conflicts surrounding ownership of antiquities reflect this connection between the collective memory of (lost) property and cultural identity.<sup>10</sup> The pressure for colonial powers to return pillaged antiquities to their

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6. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

7. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 622 (1988).

8. See Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1134–35 (2007).

9. See Singer, *supra* note 7, at 663–701.

10. The relationship between cultural property and identity has sparked an enormous output of academic literature. See generally, Kristin A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009) (surveying the literature).

places of origin, generations after they were first taken, shows the resilience of the shared memories of property. The case of the Elgin Marbles<sup>11</sup> is an obvious example, as is the (more successful) pressure for Yale University to return Incan artifacts to Peru.<sup>12</sup> The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) also seems to recognize this link between memory of property and cultural identity, requiring museums to return cultural objects to tribes who can show that the objects were once owned by members of the tribe, unless the museums can demonstrate that they acquired the property in a voluntary transaction with someone who was empowered to convey it.<sup>13</sup>

Complementing this more familiar phenomenon of the collective memory of cultural property, there is a *distributional* component to memory of property that has received far less attention in discussions of property and memory. To return to the example of my grandmother, part of her nostalgia was for specific items of property lost or left behind in Cuba, but part of it was also a lament for ownership of property in a more aggregated and relative sense (i.e., wealth and the status it conferred). Her loss in this regard was far more modest than some. She did not fall from a lofty elite, but her exile from Cuba meant the exchange of middle class comfort for the life of a working class Latina in the United States. As much as she pined for her house on Calle Concordia, she longed perhaps even more for her lost social status. In this collective, distributive dimension, the memory of lost property can form the foundation for extremely stable social identities built around the shared experience of loss, a dynamic that is powerfully on display in the case of Cuban-Americans and other exile cultures.

Both individual and, even more so, collective memories of property distributions are a powerful social force that can either reinforce the status quo or be radically subversive. Where the memory (or, perhaps more accurately in this context, consciousness) of property distribution corresponds to the existing social reality, the act of remembering reinforces that reality. Sumptuary laws, codifications of who can own (or, more accurately, use) certain kinds of property—clothing, swords, horses, etc.—have played precisely this role in many societies since ancient times.<sup>14</sup> In colonial Latin America, sumptuary laws often legally excluded those who were of mixed race “from holding public office, owning property, and adopting elite forms of transport and dress.”<sup>15</sup>

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11. See Michael Kimmelman, *Who Draws the Borders of Culture? Greece's Claim for the Elgin Marbles Is as Much About Nationalism as About Art*, N.Y. TIMES, May 9, 2010, at A1.

12. See Randy Kennedy, *Yale and Peruvian Officials Agree on Return of Artifacts*, N.Y. TIMES, Sept. 17, 2007, at E3.

13. See Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3005 (2006).

14. See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 810–18 (2010) (surveying various sumptuary codes and collecting sources).

15. Ann Laura Stoler, *Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies*, 88 J. AM. HIST. 829, 836 (2001).

On the other hand, where memory of property departs from the present distributive reality, it can delegitimize the present reality or provide a source of utopian inspiration. An obvious example is provided by the Diggers, whose memory of an earlier system of communal landownership in England inspired their resistance to private landownership in their own time.<sup>16</sup> A similar utopian dynamic surrounds the biblical concept of the Jubilee Year. According to the book of Leviticus, every forty-ninth year, ancestral property was to be returned to the descendants of those who had originally owned it.<sup>17</sup> In a society in which land was a primary form of wealth, this resetting of the property regime every few generations would constitute a radical redistribution, most likely in an egalitarian direction. Although biblical scholars generally believe that the injunction to restore property was never actually carried out, the mere act of remembering the injunction likely exerted an egalitarian influence on Israelite property thought.<sup>18</sup>

In law, the relevance of memory of property is almost always rooted in loss, or at least in the threat of loss. Where possession, title, and memory all coincide, the need for legal intervention is minimal. Legal protection under these circumstances helps property to accomplish many of its goals, both in terms of encouraging productive behavior and fostering the kinds of stable connections between people and things that help people make life plans. But it is when someone's memory of property conflicts with present possession or formal title that the power of law is most likely to be invoked. And when that happens, the law is asked to mediate, not just between memory, on the one hand, and possession or title, on the other, but often between competing memories of the same item of property.

Conflicts fought on the terrain of memory of ownership (or memory of past possession) of physical items of property present thorny dilemmas for the law of property. Property's tangibility means that, at least for a great many uses and things, allocations of property rights create a clear hierarchy among potential claimants. This is not to deny the possibility of sharing, particularly where a resource—like land—is susceptible to a number of complementary simultaneous uses. But even where sharing is possible, a system of private ownership must identify a single owner (whether an individual or an institution) as having priority in certain respects.<sup>19</sup>

Memory, on the one hand, and possession or ownership, on the other, can diverge in at least three ways. First, a person can have a memory of property that she has voluntarily relinquished. If that memory causes her to attempt to reassert ownership rights over the thing against a subsequent

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16. See, e.g., GEORGE M. SHULMAN, *RADICALISM AND REVERENCE: THE POLITICAL THOUGHT OF GERRARD WINSTANLEY* 1–5 (1989).

17. See *Leviticus* 25:8–17.

18. See generally MADELINE KOCHEN, *PROPERTY AND JUSTICE IN TALMUDIC LAW* (forthcoming 2012) (book manuscript on file with author).

19. Cf. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 275 (2008) (arguing that the “central concern” of the concept of ownership in property law “is not the exclusion of all non-owners from the owned thing but, rather, the preservation of the owner’s position as the exclusive agenda setter for the owned thing”).

possessor, the law of abandonment will block her, privileging the present possessor.<sup>20</sup> In these cases, the owner's intent to abandon the property signals that she places little or no value on possession and, consequently, that her later assertion of value in the memory of the property is not plausible or at least entitled to less deference than the claims of the current possessor.

Alternatively, a person can retain memories of property she has lost, either by neglect or accident or because she has been (legally or illegally) dispossessed by someone else. Conversely, the person currently in possession of that property—such as a squatter or a mistaken possessor—will have begun to form her own memories of the dispossessed property, which she does not formally own. When memory and possession (or formal title) diverge in this way, the law is faced with a choice of whether to honor the memories associated with present possession or those rooted in past possession accompanied by formal title. The law of property has developed an intricate web of doctrines for navigating these recurrent conflicts. I will mention just a few of the most obviously relevant:

*Adverse Possession and Prescription.* The doctrine that most obviously attempts to balance competing memories of property is adverse possession (and the related doctrine of prescription). With the passage of sufficient time, the law concludes that the present possessor or user has a superior claim, even as against the formal owner.<sup>21</sup> Although the doctrine can draw support from multiple normative theories, the role of memory of property is crucial. The connection is made most explicit in the original formulation for the statutory adverse possession period as ratifying possession that has existed since time immemorial or, later, when “the memory of man runneth not to the contrary.”<sup>22</sup> Taken literally, the statute accomplished nothing since, if there really were no memory to the contrary, there could not possibly be a dispute about rightful possession. The law gained its teeth from its legal limitation of the scope of “memory” to some particular event in the past—originally (according to the First Statute of Westminster (1275)), the beginning of the reign of Richard I (1189).<sup>23</sup> This real work of the statute in preferring certain memories over others was made even more

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20. See Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2011). As I have argued elsewhere, the common law does not empower owners to easily sever their ties of ownership to property. For example, they cannot unilaterally abandon possessory interests in land. And, because all land is owned, it is virtually impossible, as a practical matter, to abandon ownership of chattels. The practical absence of such a mechanism strengthens owners' bonds to property and reinforces the formation of memory. See generally *id.* But see Lior Jacobs Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010).

21. See JOSEPH WILLIAM SINGER, PROPERTY LAW 140–41 (3d ed. 2010).

22. 1 WILLIAM BLACKSTONE, COMMENTARIES \*76; PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 165 (2008) (quoting JOSHUA WILLIAMS, RIGHTS OF COMMON AND OTHER PRESCRIPTIVE RIGHTS: BEING TWENTY-FOUR LECTURES DELIVERED IN GRAY'S INN HALL IN THE YEAR 1877, at 186 (1880)).

23. 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01 (Michael Allan Wolf ed., 2000) (citing Statute of Westminster I, 1275, 3 Edward I, c. 39 (Eng.); Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 137 (1918)).

explicit, for the first time in 1540, when the formulation based on the absence of contrary memory was replaced with a specified period of time.<sup>24</sup>

By failing to challenge the adverse possessor's use of his property for the statutory period (in modern statutes typically seven to ten years), the original owner provides powerful evidence that he does not have (perhaps no longer has, perhaps never really had) much actual memory invested in the property. By contrast, the possessor's continuous use of the property for the statutory period means that she has built up a steady stream of more recent memories in the property. An interesting puzzle in this regard is that the law generally makes it much easier to adversely possess land than chattels.<sup>25</sup> This difference may be more apparent than real, however, for reasons that I will discuss in connection with lost property.

*Lost Property.* When property is lost, the common law always awards it to the original owner, provided he can track it down and assert his claim.<sup>26</sup> Unless a finder is able to assert a successful claim for adverse possession (which is extremely difficult to do), the original owner will prevail, even after long periods of time.<sup>27</sup> On its face, the doctrine makes no effort to actively mediate based on the strength of owners' and possessors' memories of the property. But in reality, where the owner's memory is sufficiently distant, the difficulty of tracing the location of a lost chattel increases with time in ways that may make this problem largely take care of itself. This is less true with respect to chattels that are extremely unique or valuable, such as works of art.<sup>28</sup> But for the lion's share of lost chattels, the original owner's efforts to relocate the item will likely fade within a matter of months of the loss.<sup>29</sup>

*Accession.* Where a non-owner innocently and dramatically transforms a chattel he does not own, such that the bulk of its value lies in the improvement rather than the original raw material, the law will shift entitlement to possess the finished product to the innocent improver, though it also imposes on that improver an obligation to compensate the original owner.<sup>30</sup> From the standpoint of memory of property, the principle at work would be described as the transformation of the original item such that it is no longer properly the object of the original owner's memory. It is as if the original object has been destroyed and a new item has taken its place. The law recognizes the improver's interest as more immediately worthy of

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24. See *id.* (citing 1540, 32 Hen. VIII, c. 2, § 3 (Eng.)).

25. See SINGER *supra* note 21, at 171–73.

26. See *id.* at 800.

27. See *id.* at 171–73, 800.

28. See, e.g., *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980).

29. This appears to be the assumption behind many "lost property" statutes, which frequently require finders to deposit found property over a certain value with the police for a specified period of time. In New York, for example, property worth more than \$100 but less than \$500 must be deposited with the police for six months, whereas property worth more than \$5,000 must be left with the police for a period of three years. See N.Y. PERS. PROP. LAW § 253 (McKinney 1992).

30. See SINGER, *supra* note 21, at 810.



recognition, but it honors the owner's memory of the original item in an indirect way by requiring compensation for its value.

The pattern that unites these doctrines is an initial tendency to favor memories of property rooted in past possession and formal title. Once those memories have become sufficiently attenuated (either temporally or, in the case of accession, by the transformation of the object of the memory into a new thing), however, the law shifts the legal entitlement in favor of present possession. The law's message to owners of long lost property is: move on.

Finally, it is possible for non-owners to have memories of property that they have neither owned nor possessed, property that is still very much in the possession of its formal owner. Places open to the public are particularly susceptible to this phenomenon. In 1963, the Pennsylvania Railroad tore down the original Penn Station, which it owned. The New York Times described the station's destruction as a "monumental act of vandalism," and it decried the "profit motivation" that lay behind it.<sup>31</sup> Other observers have called Penn Station an "American treasure," something that "belonged to everybody," like the Grand Canyon.<sup>32</sup> As was the case with Penn Station, the public's memories of certain properties (often held in private hands) can generate feelings of ownership over property formally owned and possessed by another. And it is the desire to avoid the feelings of loss rooted in shared memories of someone else's property that constitutes the foundation for the enactment of historic preservation statutes. Some owners chafe under the restrictions and obligations imposed by historic landmark designation, which go well beyond what the common law would have imposed on them.<sup>33</sup> Although the Supreme Court affirmed the constitutionality of landmark designations in *Penn Central Transportation Co. v. City of New York*,<sup>34</sup> they remain controversial.<sup>35</sup>

## II. MEMORIES IN PROPERTY

With memory *of* property it is human minds, individually and collectively, that do the work of remembering. With memory *in* property, property itself, individually and collectively, stores the memory. In calling this second category memory *in* property (or perhaps, property's memory),

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31. At the same time, it cast scorn on New York's "politicians, philanthropists and planners" and even "the public." Editorial, *Farewell to Penn Station*, N.Y. TIMES, Oct. 30, 1963, at 38. "A rich and powerful city," it observed, "noted for its resources of brains, imagination and money, could not rise to the occasion." *Id.*

32. NEW YORK: A DOCUMENTARY FILM, THE CITY AND THE WORLD: EPISODE 7: 1945 TO PRESENT (PBS 1999).

33. See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 500 (3d ed. 2005) (observing that "[a]n owner who finds landmarking burdensome may respond in a socially destructive manner" and citing examples).

34. 438 U.S. 104 (1978).

35. See Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 791-96 (2009) (referring to the Penn Central decision as "controversial" and offering a defense).

I do not mean to fetishize property or deny the role of human agency in creating and interpreting the memories embedded in property. To say that, for example, a USB drive stores memory is not to deny that human beings created the drive as a medium of memory, inserted the individual memories it stores, and, when they access the memories stored in the physical substrate of the drive, give life to them. Nor, as will become apparent, do I mean to suggest that human beings are powerless to affect the degree to which property effectively stores the memories human beings put into it. Indeed, the degree to which property is able to serve as a vehicle of memory storage constitutes one of the most important areas of policy discussion concerning the design of property institutions. But treating property as a kind of medium of memory that is external to human minds captures an important dimension of how property and memory interact.

Like memory of property, memory in property comes in different forms depending on whether our focus is on individual items of property (which I will refer to as “physical memory”) or a system of property collectively (“distributive memory”). The distinction here is drawn, again, on the basis of the object on which memory operates, not the nature of memory itself. Thus, as we will see, the mechanisms by which memory is embedded in the physical structure of individual items of property will be dramatically influenced and reinforced by undeniably collective phenomena, such as neighborhood effects.

#### *A. Physical Memory*

The idea of the physical inscription of memory within items of property should be familiar to everyone. After all, a book or a diary (or a USB drive or a hard disk) is nothing if not an item of personal property that has been physically altered in order to store memory. Although this process of embedding memory on the physical structure of an object is the foundation of written culture, and even predates it,<sup>36</sup> we often take it for granted and very likely underestimate the breadth of its operation. It certainly extends well beyond the boundary of the kind of intentional linguistic inscription at work in the process of, say, writing a book. The collection of mementos, for example, is an important form of memory in property.

Memory can also become embedded in property less self-consciously and even without any intention on the part of the person forming the memory. An old comfortable chair or a well-broken-in baseball glove retains the imprint of its user in a very visible and personal way. The nicks and

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36. I have in mind the use of mnemonics in preliterate cultures. The Incas, for example, famously used knotted threads, known as *quipus*, for this purpose. See generally Cyrus L. Day, *Knots and Knot Lore: Quipus and Other Mnemonic Knots*, 16 W. FOLKLORE 8 (1957). New England Indians used an interesting device known as “memory holes” to assist them in remembering significant events. NATHANIEL PHILBRICK, *MAYFLOWER* 105 (2006). According to Philbrick, the Pokanokets dug “circular foot-deep holes in the ground” wherever “any remarkable act” had occurred. *Id.* These holes were part memorial, part time capsule. “It was each person’s responsibility to maintain the holes and to inform fellow travelers of what had once happened at that particular place so that many things of great antiquity are fresh in memory.” *Id.* (internal quotation marks omitted).

scratches on a piece of antique furniture, though less specific in the message they convey, remind us of the life the item has seen and therefore add character and value. Even unused and unweathered, the mere survival of an item of personal property houses a wealth of information about our past: forgotten fads, technologies, practices, embodied in an item of personal property. This connection between cultural memory and the most everyday items of personal property is the insight behind museum collections.

An interesting question in this regard concerns the increasing number of cultural artifacts that exist primarily, and in many cases exclusively, in digital form: digital photographs, outdated (or vintage, depending on your point of view) video games, and digitized out of print books, just to name a few. Archiving these “antiques” in a usable form will be an increasing—and important—challenge in years ahead, unless our culture is to lose a great deal of its ability to decipher its own memories.

The possibility of losing our power to interpret the information stored in the artifacts around us points towards the potential for memory in property to become latent or unconscious. In a sense, the information is still there, if only we (or some trained expert) can recognize it. There is an interesting interplay in this regard between the memory *of* property and memory stored *in* property, particularly in the case of cultural property. The unearthing of a previously unknown Native American gravesite, for example, which we can think of as the discovery of a latent memory stored in property, can, once interpreted, create new content for a tribe’s collective memories of lost property.

My focus to this point has been on the storage of memory in artifacts of personal property. But, as I have argued elsewhere, land also has a powerful memory.<sup>37</sup> Changes that human beings make to the land have a tendency to remain in place until they are affirmatively removed. And because the quantity of land is fixed, we are fated to live our lives within a landscape that bears the indelible imprint of our forebears, even if we do not always recognize that imprint for what it is.

Physically, land’s memory is as variable as the land itself. Some land is so dynamic that its human imprint can be maintained only by constant effort. Left to its own devices, the continuously advancing and retreating sandy seashore is likely to undermine all but the most tenaciously constructed “improvements.” Very often, however, land is sufficiently stable that human transformations will remain in place almost indefinitely unless human beings actively restore the land to its prior form. When this is the case, the changes to the landscape made by prior owners can qualify and constrain present decision making in dramatic ways.

To the extent that the memories of a living human being are invested in a particular parcel of land, it will reinforce land’s tendency to serve as a medium of memory. The physical and psychological tenacity of our impacts on the land, however, is not the entire story of land’s memory. The inertial power of individual land uses is powerfully reinforced by their

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37. See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 853–56 (2009).

collective interdependence. Once in place, land uses presuppose and reinforce one another in ways that make it difficult to undo one piece without affecting many others.<sup>38</sup> A single house, considered in isolation, is only as stable as its owner, but a neighborhood of homes, businesses, clubs, and churches constitutes an interlocking and interdependent network of relationships and commitments that is, collectively, exponentially more durable than each of its constituent parts.<sup>39</sup>

The interplay of these physical, psychological, and social components of land's memory yields a powerful path-dependence in land use. After it has been built, a highway cannot be shifted without doing significant harm to the numerous businesses and homeowners who have come to depend on it for access to their properties. A city founded in a particular location to take advantage of access to waterborne transportation will remain in the same place long after its locational advantages have been dissipated by cultural change or technological advance.<sup>40</sup> Similarly, sprawled out, low density residential neighborhoods built around automobile use and cheap gasoline will be extremely difficult to dislodge once fuel becomes expensive or the technology of personal transportation shifts away from the car. The constellations of land uses we confront today are the consequences of countless decisions made decades (even generations) ago, and the decisions we make today will reverberate through the same mechanisms far into the future.

The stability of land use makes it a logical target for the intentional inscription of our most important cultural memories. The act of burying bodies and building monuments (often over dead bodies) is a testament to our faith in the stability of land's memory. And land's memory is often harnessed to work in concert with the memory stored in chattels, as exemplified by the practice of burying "time capsules" in the ground or under public buildings.

### *B. Distributive Memory*

The notion that land or personal property physically embed human memories, whether intentionally or not, is probably obvious to most people. What may be less intuitive is the way allocations of property among human beings constitute a form of collective memory that is transmitted from one generation to the next. Where one's ranking in terms of relative property allocation significantly determines the property allocation for a subsequent generation, we can understand the relative distribution itself as a form of social memory written into the system of property. This distributive dimension to memory in property is easiest to see in a feudal system, where relative property allocations are extremely (and intentionally) sticky. But it also operates in a modern capitalist economy like our own.

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38. See DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* 41 (2003); William A. Fischel, *Why Are There NIMBYs?*, 77 *LAND ECON.* 144, 150 (2001).

39. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 143–77 (1961).

40. See RAE, *supra* note 38, at 42–72.

It is important to keep the stickiness of relative property distribution (so called "relative mobility") distinct from two similar phenomena: property inequality and rising standards of living (or what some have called "absolute mobility").<sup>41</sup> The mobility of relative property distribution focuses on the degree to which one's relative ranking in terms of share of total income or wealth at time T1 predicts one's ranking (or, perhaps more importantly, the ranking of one's children) at some later time.<sup>42</sup> The very ability of the institution of property to protect individual possession over time reflects this kind of memory in action. The stickiness of a property distribution could operate through a number of mechanisms. For example, restraints on the alienation of real property might lead to enormous stability in the allocation of land from one generation to the next. Alternatively, the possession of a great deal of property at one point in time might, depending on background social institutions, make it easier for parents to pass competitive advantages on to their children. No matter what the mechanism, where relative mobility is low, the property distribution at any one point in time becomes a kind of social fixed point.

Although the mythology of the United States embraces a powerful belief in the almost limitless possibility of social mobility, the reality is significantly less dynamic for most Americans, particularly those at the top and the bottom. Numerous recent studies have observed that relative social mobility in the United States lags well behind mobility in several Western European countries.<sup>43</sup> According to one 2008 Brookings study, for example, "it is fairly hard for children born in the bottom fifth to escape from the bottom: 42 percent remain there and another 42 percent end up either in the lower-middle or middle fifth."<sup>44</sup> On the other end of the spectrum, the Brookings study found that 39 percent of those born in the top quintile remain there, with an additional 23 percent landing in the second highest quintile.<sup>45</sup> In the United States, about half of parental relative earnings advantages are passed onto children, meaning that it takes roughly six generations for exceptional advantages of birth to dissipate.<sup>46</sup> In contrast, in higher mobility countries (such as Canada, Norway, Finland, and Denmark) less than 20 percent of parental advantages are passed onto children.<sup>47</sup> Indeed, one study has found that the United States is somewhat

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41. See Isabel V. Sawhill, *Overview* to Julia B. Isaacs et al., *Getting Ahead or Losing Ground: Economic Mobility in America*, BROOKINGS INST. 1, 2 (2008), [http://www.brookings.edu/~media/Files/rc/reports/2008/02\\_economic\\_mobility\\_sawhill/02\\_economic\\_mobility\\_sawhill.pdf](http://www.brookings.edu/~media/Files/rc/reports/2008/02_economic_mobility_sawhill/02_economic_mobility_sawhill.pdf).

42. See *id.*

43. See, e.g., Isaacs et al., *supra* note 41; see also Bhashkar Mazumder, *Fortunate Sons: New Estimates of Intergenerational Mobility in the United States Using Social Security Earnings Data*, 87 REV. ECON. & STAT. 235 (2005); Gary Solon, *Cross-Country Differences in Intergenerational Earnings Mobility*, 16 J. ECON. PERSPECTIVES 59, 64 (2002).

44. See Julia B. Isaacs, *Economic Mobility of Families Across Generations*, in Isaacs et al., *supra* note 41, at 15, 19.

45. *Id.*

46. Julia B. Isaacs, *International Comparisons of Economic Mobility*, in Isaacs et al., *supra* note 41, at 37, 38–39.

47. *Id.* at 39.

exceptional in the low intergenerational mobility of those at the bottom of the economic ladder.<sup>48</sup>

Like memory of property, the phenomenon of property's memory is, normatively speaking, a mixed bag. On the one hand, the physical dimensions of memory in property constitute important mechanisms for preserving cultural knowledge. In part, NAGPRA is rooted in a desire to honor the memory of property, however distant. But it is also about the way property encodes cultural memory. A world in which all chattels were physically destroyed (and recycled) every twenty years would be significantly impoverished by the loss of this physical channel of cultural transmission. And memory in property provides a stability that lies near the heart of the benefits identified as flowing from private ownership more generally. In addition, the inertia of land's memory, while sometimes costly, slows down change in a way that can help us avoid a sense of constant dislocation and alienation.

The costs of this physical memory are more elusive, at least for chattels. The problem of solid waste disposal may represent one such cost. For land, however, the costs of property's memory are more readily apparent. The powerful path-dependence that land's memory engenders makes it much more expensive—and sometimes practically impossible—to change direction when circumstances require it. Land's physical memory operates as a kind of dead hand control, with all the associated inefficiencies that can generate.

The difficulty that shrinking cities like Detroit have in coordinating population loss in a way that maximizes the viability of the community as a whole is a testament to the power of land's path-dependence. Individual owners hold on tightly to their place, even in doomed neighborhoods that have long since surrendered their former vitality.<sup>49</sup> As the New York Times put it in a story about Detroit's struggles with population loss:

Actually carrying out [urban consolidation], particularly in a city as vast as Detroit, is like solving a complicated set of interwoven puzzles, as [city planners have] discovered over many long days and some nights poring over thousands of pages of maps and statistics . . .

How to reconfigure roads, bus lines, police districts? How to encourage people—there is no power of eminent domain to force them—to move out of the worst neighborhoods and into better ones?<sup>50</sup>

Significant benefits of the distributive memory embedded in property are harder to discern. But there surely is some value to parents' ability to

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48. See Markus Jantti et al., *American Exceptionalism in a New Light: A Comparison of Intergenerational Earnings Mobility in the Nordic Countries, The United Kingdom and the United States* (IZA, Discussion Paper No. 1938, 2006), available at <http://ftp.iza.org/dp1938.pdf>.

49. See Edward L. Glaeser, *Shrinking Detroit Back to Greatness*, N.Y. TIMES ECONOMIX (Mar. 16, 2010, 6:56 AM), <http://economix.blogs.nytimes.com/2010/03/16/shrinking-detroit-back-to-greatness/>.

50. Monica Davey, *An Odd Challenge for Planners: How to Shrink a City*, N.Y. TIMES, Apr. 6, 2011, at A14.

transmit some of their relative advantages to their children. The desire to transmit those advantages is likely a significant motivation for the productive effort of many parents. And that desire arguably reflects (at least in part) the degree to which the successful transmission of advantage strengthens the bond between parents and children, which is valuable in its own right. I do not want to be understood as claiming too much here. My point is not that the ability to pass on advantage is necessary for parent-child bonding, but some degree of transmission is doubtless helpful in fostering that connection.

On the other side of the ledger, the costs of distributive memory are apparent. Societies that ossify rigidly along class lines are both unfair and inefficient. They reward the sloth of pampered heirs and fail to encourage productive behavior among those unlucky enough to be born at the bottom. As the Cuban Revolution shows, too much social stability can yield a great deal of resentment. Excessive attempts to preserve social hierarchy are ultimately self-defeating. The trick is to find a sweet spot between a total inability to give one's children a leg up and the sort of perfect intergenerational transmission of advantage that locks a society into a rigid caste system.

### *C. Memory in Property and the Law*

Surveying the law of property, it is not too difficult to find doctrines that reflect a normative ambivalence about memory in property in both its individual and collective, distributive dimensions. Sometimes, the law seems to embrace the path-dependence of memory in property. Adverse possession and prescription, for example, favor continuity. They ultimately grant the force of law to "facts on the ground," provided that sufficient time has gone by, even (in many jurisdictions) when those facts were generated in bad faith by someone who knew he was acting with no legal right.<sup>51</sup> More dramatically—though without the tolerance of knowing violations—the doctrine of relative hardship will allow someone who innocently improves the land of another to force a sale of the property where the cost of removing the improvement vastly exceeds the loss imposed on the actual landowner.<sup>52</sup> The doctrine's ratification of recently created facts on the ground reinforces the operation of memory in property by, in effect, locking in physical transformations through the grant of immediate legal protection. Other doctrines that privilege existing land uses, ultimately strengthening the operation of memory in property, include the law of real covenants and equitable servitudes, which facilitate present owners' efforts to lock in their vision of a parcel's best use in ways that bind future owners. Finally, there are the doctrines of vested rights and prior nonconforming uses, both of which protect land users from changes in the regime of land use regulation

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51. See Nomi Maya Stolzenberg, *Facts on the Ground, in PROPERTY AND COMMUNITY* 107, 107 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

52. See *Proctor v. Huntington*, 238 P.3d 1117 (Wash. 2010).

once they have gone far enough down a path of putting a land use into place.<sup>53</sup>

On the other hand, the law seems to acknowledge the potential dark side of memory in property by providing a number of tools for overcoming it. For land, the main legal mechanism for combating the path-dependency engendered by physical memory is the doctrine of eminent domain. Although recently the subject of some controversy, it has for thousands of years been understood to constitute an essential component of sovereign power.<sup>54</sup> By empowering the state to overcome individual landowners' preferences, eminent domain reduces the costs that land's memory would otherwise impose on the state's efforts to achieve important public policy goals. It is no surprise that eminent domain is frequently mentioned in connection with shrinking cities' efforts to overcome resistant residents within dying neighborhoods.<sup>55</sup> Servitudes doctrines—like “changed conditions,” which attempts to limit the enforcement of ancient covenants that seem to no longer serve a valuable purpose—similarly counteract the inertia of dead hand control through the law of servitudes.<sup>56</sup>

The most obvious common law doctrine for resisting property's distributional memory is the rule against perpetuities. To the extent that owners can use future interests and trust mechanisms in an effort to insulate their descendants from the consequences of their own improvidence, the rule puts a time limit on that protection, requiring dead hand control to expire within roughly two generations.<sup>57</sup>

Estate and gift taxes constitute another set of legal tools for combating distributional memory embedded in property. While permitting decedents to pass on significant quantities of property to the next generation, the estate tax dampens the ability of earlier distributions to reproduce themselves across generations. The actual function of these laws nicely reflects the normative ambiguity of memory and property. The law of succession freely permits owners to designate who will receive individual items of property they leave behind. At the same time, it levies a tax—collected in the form of fungible money—on the total market value of the estate conveyed.<sup>58</sup>

### III. TINKERING WITH THE RELATIONSHIP BETWEEN LAW AND MEMORY

#### A. *Adverse Possession*

Adverse possession law has existed in some form in the Anglo-American common law for nearly a thousand years.<sup>59</sup> The law shifts title to a parcel

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53. See SINGER, *supra* note 21, at 645–47, 650–51.

54. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 8–18 (1985).

55. See Glaeser, *supra* note 49.

56. See SINGER, *supra* note 21, at 288–91.

57. See *id.* at 328.

58. See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 845–49 (7th ed. 2005).

59. See SINGER, *supra* note 21, at 140.



of land to an occupant who has possessed the land “openly and notoriously” for some period of time (under modern statutes, typically seven to ten years).<sup>60</sup> For most of the doctrine’s history, and in most jurisdictions today, the law has not inquired into the state of mind of the adverse possessor by asking, for example, whether the adverse possessor believed she actually owned the land when she entered. Rather, it has looked to the nature of the adverse possessor’s occupancy. If the adverse possessor has used and occupied the land as a typical owner would for a long enough period of time, she has typically prevailed against the title owner.

In recent years, however, individual cases of successful adverse possession have generated negative public reactions.<sup>61</sup> Much of that reaction has been framed in terms of the doctrine’s tendency to violate, or reward the violation of, property rights. In at least two states, New York and Colorado, legislatures have responded by trying to make it more difficult—and, in New York’s case, perhaps impossible—to adversely possess land you know to belong to someone else, or even land you believe that you own where you lack an “objectively reasonable basis” for that belief.<sup>62</sup> The New York law in particular puts a heavy thumb on the scale of distant memories of property in a way that arguably upsets the careful balance struck by adverse possession law.

### *B. The Rule Against Perpetuities and Estate Taxation*

The federal estate tax was created in 1916.<sup>63</sup> After allowing for a very significant deduction, thereby ensuring that it touches only a small number of (indeed, the very few largest) estates, it imposes a tax on transfers of property occurring at death, either formally or substantively. The use of life estates strung end to end offers a potential mechanism for avoiding the estate tax, but the rule against perpetuities prevents this form of tax avoidance from extending more than two generations or so into the future.<sup>64</sup> Nevertheless, in order to prevent the circumvention of the estate tax through the use of life estates, Congress enacted a “generation-skipping transfer tax” in 1986.<sup>65</sup>

As I observed above, taxes on wealth transfers between generations constitute an important tool in the effort to limit the reach of property’s distributive memory. Obviously, this policy of limiting the persistence of present distributions is not appealing to many of those who hold large concentrations of wealth.<sup>66</sup> For many years, the wealthy—and those

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60. *See id.* at 143–55.

61. *See, e.g.,* Jeanette Torres, *Texas Man Gets Mansion for \$16 with Adverse Possession Law*, ABC NEWS RADIO (July 19, 2011), <http://abcnewsradioonline.com/business-news/texas-man-gets-mansion-for-16-with-adverse-possession-law.html>.

62. *See* N.Y. REAL PROP. ACTS. LAW. § 501 (McKinney 2009) (amended in 2008).

63. *See* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1312 (2003).

64. *See id.*

65. *See* I.R.C. § 2612 (2006); Dukeminier & Krier, *supra* note 63, at 1312.

66. *But see* WILLIAM H. GATES SR. & CHUCK COLLINS, *WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES* (2002).

ideologically opposed to redistribution—have waged a multipronged attack against both the rule against perpetuities and the estate tax. Since the late 1980s, nearly half the states have abolished or virtually eliminated the rule against perpetuities for trusts, creating the possibility of perpetual or dynastic trusts that can escape the reach of both the estate tax and the generation-skipping transfer tax.<sup>67</sup> In addition, Congress has repeatedly increased the estate tax deduction and lowered the rate of estate taxation, and the permanent abolition of the estate tax remains a major goal of congressional Republicans.<sup>68</sup> The combined effect of these policies is to make it easier for concentrated wealth to reproduce itself across generations, dramatically enhancing the “memory” of existing property distributions.

### CONCLUSION

I began with the story of my grandmother’s memory of lost property. I will close with another story about memory and its dangers. In *Funes el Memorioso*,<sup>69</sup> Jorge Luis Borges tells the (fictional) story of a young man with a perfect photographic memory. Borges describes how Funes passes his time—reliving the perfect memory of past days and creating a system of counting in which each number has a unique, frivolous name (“Instead of seven thousand thirteen (7013), he would say, for instance ‘Máximo Pérez’ . . .”).<sup>70</sup> Borges recognized the danger of never forgetting: “[Funes] had effortlessly learned English, French, Portuguese, Latin. I suspect, nevertheless, that he was not very good at thinking. To think is to ignore (or forget) differences, to generalize, to abstract. In the teeming world of Ireneo Funes there was nothing but particulars—and they were virtually *immediate* particulars.”<sup>71</sup>

Unlimited memory is no less dangerous to a system of property than it is to an individual’s ability to think. What is striking about the recent reforms of adverse possession, the rule against perpetuities, and the estate tax is their supporters’ apparent disregard of the costs of overprotecting memories of property and memories in property. The common law’s more measured approach seems implicitly to recognize the need to balance memory against possession, stability against fluidity. The recognition that ratifying property’s memories generates both costs and benefits does not counsel decisively against the wisdom of modifying the law of adverse possession or abolishing the rule against perpetuities, but it does cast doubt on the one-sided approach of the proponents of these measures. In the law of property, memory is not an unmitigated good.

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67. See Dukeminier & Krier, *supra* note 63, at 1313–15.

68. See, e.g., Albert R. Hunt, Op.-Ed., *Republicans’ Ideology Dooms Deal on U.S. Debt*, N.Y. TIMES (July 17, 2011), <http://www.nytimes.com/2011/07/18/us/18iht-letter18.html>.

69. Translated literally: “Funes the Memorious.”

70. JORGE LUIS BORGES, *Funes, His Great Memory*, in COLLECTED FICTIONS 131, 136 (Andrew Hurley trans., 1998).

71. *Id.* at 137.

The stability of property entitlements fosters and is in turn reinforced by memory. The common law of property takes a mixed view of this phenomenon. When confronted with conflicting claims concerning memories of property, the law initially favors the memories of past possessors, but eventually shifts its loyalties toward present possessors. Similarly, the law facilitates the use of property forms to embed individual and distributive memory within property, but it has also traditionally imposed limits on those efforts, through numerous doctrines meant to weaken the grip of dead hand control. The law's ambivalence towards the claims of memory sounds a useful cautionary note in the midst of present efforts to dismantle many of the obstacles the law of property has traditionally placed in the way of the claims of memory.